

## TITLE 327 WATER POLLUTION CONTROL BOARD

### LSA Document #08-210

#### SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

IDEM requested public comment from October 22, 2008, through November 21, 2008, regarding amendments to rules concerning implementation of Indiana law regarding environmental impact statements for major state actions that may significantly affect the quality of the human environment. IDEM received comment letters from the following parties by the comment period deadline:

Improving Kids' Environment (IKE)

Sierra Club Hoosier Chapter (SC)

Following is a summary of the comments received and IDEM's responses thereto:

*Comment:* Indiana's environmental impact review law is based on the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., generally known as NEPA, which was passed in 1969. NEPA was the first major piece of federal environmental legislation. It reflected a recognition that federal agencies, before they took or funded major activities, should consider the potential environmental impacts of those activities and possible alternatives that would lessen those impacts. The law was based on a premise that environmental quality is important to humans and that legitimate public policy goals can be carried out in a way that is protective of environmental quality. The first step to achieving this is for agencies to consider and describe potential environmental impacts as they are planning their projects and activities and making their funding choices, and to do so in a way that allows other agencies and the public to participate in the process. Years after the passage of NEPA and Indiana's law based on it, consideration of potential environmental impacts remains important. (IKE, SC)

*Response:* IDEM agrees and believes that the update of these regulations will make the process easier and more transparent for agencies using the rules and interested persons.

*Comment:* Environmental impact statements can be a major benefit in assuring the public that government agencies are giving due consideration to the effects that their actions may have on the environment. It is laudable that the Water Pollution Control Board is willing to review its obligations under IC 13-12-4-5 to define by rule "the actions that constitute a major state action significantly affecting the quality of the human environment" so that government agencies can fulfill their obligations under the law. (SC, IKE)

*Response:* IDEM believes the new definitions will be a benefit to agencies in determining the applicability of these regulations on agency activities.

*Comment:* 327 IAC 11-1-3(e)(1) provides for categorical exemptions for minor state actions with an agency having the ability to develop a list of activities it proposes to consider as minor for purposes of this rule. Categorical exemptions can be accepted if the rule requires each agency to include the public, as well as the governor and IDEM, in the opportunity to comment on the list of minor actions developed by the agencies. The public should be given opportunity to comment on the agencies' developed lists of minor actions before the lists are finalized. Therefore, please include the public at 327 IAC 11-1-3(e)(1)(B)(I). (SC, IKE)

*Response:* This rulemaking does not prohibit an agency from seeking public comment on

its minor actions list. Requiring specific public comment procedures of implementing agencies is beyond the statutory authority of this rule.

*Comment:* The rule needs to be more specific at 327 IAC 11-1-3(e) on how notice should be provided to the public. A suggestion would be that IDEM be responsible for publishing notices of the agencies' draft lists of minor actions in the Indiana Register, which is the expected location for actions of this type to be published. (IKE)

*Response:* IDEM is not responsible for the lists. The agencies that develop the lists are responsible for development, consultation with IDEM and the governor and providing public notice to interested parties under the amended language. IDEM was removed as a repository for the lists under the amended language because, by statute, each agency must determine when these regulations apply to it, not IDEM.

*Comment:* While it is appropriate for IDEM to assist other state agencies in developing procedures for performing environmental assessments and environmental impact statements, the requirement for "a state form for environmental assessment" in 327 IAC 11-1-4 and the definition of "environmental assessment" at 327 IAC 11-3-3 may suggest to agencies that the assessment is only a cursory summary of the proposed action. IDEM should provide guidance for both types of review, not simply provide a form for assessments. (SC, IKE)

*Response:* IDEM intends to develop more extensive guidance on both assessments and impact statements with the aid of other agencies that must implement these regulations. The form was previously in the rule itself and it was thought more appropriate to make it an actual state form which can be updated more regularly than the rule itself.

*Comment:* The state law, IC 13-12-4-5, does not specify exact procedures for agencies to follow in implementing the environmental review program although good models exist at the federal level and from a variety of other state laws. In addition to IDEM providing guidance to its sister agencies on procedures to follow so there is both clarity and consistency for agencies that are not as familiar with environmental issues, the rule should provide opportunities for public input into the development of that guidance. The workgroup IDEM has established for this rulemaking would be an appropriate vehicle for that input. (IKE)

*Response:* IDEM agrees that the workgroup process is valuable in developing topics for guidance as well as procedures helpful to those implementing these rules. The rule itself is not the appropriate place to import public procedures for the development of guidance without additional statutory authority.

*Comment:* 327 IAC 11-1-4(b) describes procedures for developing an environmental impact statement; yet, it is contained in a section entitled "General considerations for preparing environmental assessment forms". The rule should have a separate section on preparing environmental impact statements and this new section should contain explicit language that states that the public will have an opportunity to comment on draft environmental impact statements before they become final. (SC)

*Response:* The Indiana Environmental Policy Act does not provide for public comment on environmental impact statements, only public notice, IC 13-12-4-5. Although this rulemaking is not intended to place any additional requirements on implementing agencies beyond those already required by statute or the current rule, there is nothing that prohibits implementing agencies from accepting public comment should they choose to do so.

*Comment:* It is critical that IDEM give agencies guidance on how to notify the public of proposed actions that will or may require an environmental impact statement and give the public an opportunity to comment on the issues to be considered in the statement and on the adequacy of the statement once it is produced. (IKE)

*Response:* The Environmental Policy Act requires public notice by each agency of environmental impact statements under IC 13-12-4-5. The authority for this rulemaking does not extend to developing public notice procedures for implementing agencies. It is up to each agency to determine how it must comply with state law as well as these regulations.

*Comment:* The word “briefly” should be deleted from 327 IAC 11-3-3(a)(1) because the discussion in an environmental assessment needs to be sufficiently detailed for the agency and the public to reach a judgment about the significance of the potential impacts. Additionally, a fourth subdivision should be added under 327 IAC 11-3-3(a) to read as follows:

“(4) Informs the public of the reasons for the agency’s decision if it determines that no environmental impact statement is necessary.”

(SC, IKE)

*Response:* The definition is taken from NEPA, Section 1508.9. An assessment is meant as the first step in determining whether a more exhaustive impact statement is necessary, thus the use of the term “brief”. Adding public notice requirements to a definition is not the correct place to do so nor is it required under the existing Indiana Environmental Policy Act. This rulemaking does not seek to impose additional requirements on implementing agencies beyond those required by statute and the current rules.

*Comment:* The definition of “environmental impact statement” should include language stating that the agency must solicit public comments before the environmental impact statement becomes final.(SC)

*Response:* Adding public notice requirements to a definition is not the correct place to do so. This rulemaking does not seek to impose additional requirements on implementing agencies beyond those required by statute and the current rules. Under IC 13-12-4-5, environmental impact statements must be made available to the public. Nothing prohibits implementing agencies from seeking public comment on draft environmental impact statements.

*Comment:* The word “potential” should be added before “environmental impacts” at 327 IAC 11-3-4(1). (IKE)

*Response:* IDEM agrees and has included the change in the draft rules.

*Comment:* The draft language at 327 IAC 11-3-4(3) should be extended with the additional words, “including the no action alternative.” Discussion of the “no action” alternative is routinely required under federal NEPA and is important because it allows the agency and the public to consider the potential impacts of the proposed project in comparison to the option of not doing the project at all. (IKE, SC)

*Response:* IC 13-12-4-5(2)(C), from which the language was taken, includes a requirement that agencies consider, “[a]lternatives to the proposed action.” when developing an environmental impact statement. This broad language could encompass a “no action” alternative, should implementing agencies choose to include such a discussion. However, there is no specific statutory direction to require a discussion of a “no action” alternative and this rulemaking was not intended to impose additional requirements on implementing agencies beyond those required in statute. It may be appropriate in guidance to clarify that a discussion of alternatives could also include a “no action” alternative and the implications thereof in an environmental impact statement.

*Comment:* The language used at 327 IAC 11-3-4(4) is taken from IC 13-12-4-5, but the meanings are obscure. 327 IAC 11-3-4(4) requires a description of “the relationship between local, short-term uses of the environment and the maintenance of long-term productivity.” Does this mean the productivity of the environment or is it a reference to economic productivity? (SC)

*Response:* This rulemaking does not seek to change any meaning derived from the

original statutory language of the Indiana Environmental Policy Act, nor is it intended to enlarge on the requirements for implementing agencies beyond those originally intended by statute. This rulemaking is intended to specifically address the statutory charge to the environmental boards to define “major state action significantly affecting the quality of the human environment.” It is beyond the scope of this rulemaking to attempt to define and clarify legislative intent.

*Comment:* The language used at 327 IAC 11-3-4(5) also is taken from IC 13-12-4-5 and is obscure in meaning. Subdivision (5) requires a description of “any irreversible and irretrievable commitments of resources that would be involved...”, but it is not clear if this refers only to natural resources or to all kinds of resources. (SC)

*Response:* IDEM agrees that there exists some lack of clarity in the Environmental Policy Act statutes. However, the scope of this rulemaking is limited to the statutory charge within the Act to the environmental boards. It is up to each implementing agency to determine how the Act applies to it. It would seem reasonable that, without a limiting adjective, the term “resources” could be read to include all types of resources. However, it is not within the scope of this rulemaking to clarify legislative intent.

*Comment:* An additional subdivision should be added to 327 IAC 11-3-4 to read as follows:

“(6) Any opportunities that exist to mitigate or reduce potential environmental impacts with the preferred alternative.”

Providing for evaluation of opportunities to mitigate potential environmental impacts is an important step that ought to be included in an environmental impact statement. Whatever the possible environmental impacts, there are generally adjustments that can be made to projects to reduce the impacts, and the environmental impact statement is the right place to evaluate those and seek input from other agencies and the public on ways to do so. (IKE)

*Response:* The five factors listed in the definition are found at IC 13-12-4-5(C), which describes what is required in an environmental impact statement. While this rulemaking was not intended to impose additional requirements beyond those required by statute, it may be appropriate to include information on discussing opportunities to mitigate environmental impacts in the guidance which will be developed to aid implementing agencies when they are conducting an environmental assessment or developing an environmental impact statement.

*Comment:* The word “impairment” should be added at 327 IAC 11-3-8(4)(C) so that the clause reads as follows:

“(C) The degree to which the action may cause loss, impairment, or destruction of significant:”

(SC, IKE)

*Response:* IDEM agrees and has included the change in the draft rules.